

Editor's note: Reconsideration granted; decision affirmed as modified -- Order dated Oct. 20, 1987 -- See 89 IBLA 315A th D below.

JEAN P. WALSH

IBLA 84-413

Decided November 12, 1985

Appeal from a decision of the Nevada State Office, Bureau of Land Management, rejecting desert land entry application N-23404.

Vacated and remanded.

1. Desert Land Entry: Applications--Desert Land Entry: Water Right

When, on the face of a desert land application, an applicant has indicated that he or she has proceeded as far as possible in obtaining a water right but has failed to document this fact in the application, it is error to reject the application under 43 CFR 2521.2(d) without first affording the applicant an opportunity to submit proof corroborating the assertions on the application.

APPEARANCES: Jean P. Walsh, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Jean P. Walsh has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated March 20, 1984, which rejected her desert land application N-23404 because "you have not proceeded as far as possible in acquiring a right to water for your entry." BLM stated that the information submitted with the application indicated appellant proposed to irrigate the land from a well but that no evidence had been provided to show that an application had been made to the Nevada State Water Engineer for appropriation of underground water for irrigation purposes.

In her statement of reasons, appellant states that she presented evidence of state water application No. 37427 at the time she filed her desert land application with BLM, "but was told it was unnecessary since I did not yet have the land." Accompanying the statement of reasons are a receipt from the State of Nevada Engineer's Office showing payment of filing fees and a letter from the Nevada Department of Conservation and Natural Resources, Division of Water Resources, acknowledging receipt of an application to

1/ If water is to be obtained from an irrigation district, corporation, or association, the regulation provides that either a contract with the entity or written assurance from the entity must be provided.

appropriate public waters. Both documents show that appellant made such application on March 30, 1979. Her original desert land entry application was filed with BLM on April 2, 1979, but was amended on October 1, 1979, to include an additional 80 acres.

Section 1 of the Desert Land Act, 43 U.S.C. § 321 (1982), permits entry of desert lands for the purpose of reclamation "by conducting water upon the same" provided the right to use the water has been acquired by "bona fide prior appropriation." By regulation, an application for a desert land entry is required to be

accompanied by evidence satisfactorily showing either that the intending entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or in States where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert land entry or the entry is allowed, a showing that the applicant is otherwise qualified under State law to secure such permit or right. * * * The authorizing officer will examine the evidence submitted in such applications and either reject defective applications or require additional evidence.

43 CFR 2521.2(d). Thus, if water is to be obtained by appropriation, an application for a desert land entry must be accompanied by evidence of a water right, evidence that an appropriation has been initiated and pursued as far as possible under state law, or, in states such as Nevada, evidence that the applicant is qualified under state law to secure a water permit or water right. 1/

In the present case, no evidence of a water right was submitted with the application. The decision of the State Office noted that a decision of this Board, styled James R. Hardcastle, 69 IBLA 341 (1982), had held that any desert land application which is submitted without evidence that the applicant has taken action to initiate the right to appropriate water for irrigation purposes must be rejected. The State Office further noted that appellant had not submitted any evidence that indicated that she had applied to the State Water Engineer for appropriation of underground water. Therefore, the State Office rejected her application.

Appellant argues that she not only had made an application for a state water right as of the time of her desert land entry application, but that, when she attempted to submit it with her application, she was told not to do

so. The question for decision is whether the failure to make such a submission at the time of filing an application requires rejection of the application. Within the facts of this case, we think not.

Under 43 CFR 2512.2(d), the authorized officer is empowered to either reject defective applications or seek additional evidence as to compliance. In certain prior cases, most notably Dale Christiansen, 82 IBLA 97 (1984), the Board expressly affirmed rejection of applications for failure to submit evidence of acquisition of water rights without requiring BLM to make further inquiry. A similar result was reached in Albert N. Smith, 87 IBLA 253 (1985). But a consistent thread running through these decisions was the fact that on their applications the applicants had responded in the negative to question 12b, which inquired: "Have you proceeded as far as possible toward acquiring by appropriation, purchase or contract, a right to the permanent use of sufficient water to irrigate and reclaim permanently all of the irrigable portions of each of the legal subdivisions applied for?" Since the applicants in those cases expressly admitted on the face of the application that they had not fulfilled the regulatory requirement, rejection of their applications, without prior notice, was deemed to comport with the regulatory scheme.

In the present case, by way of contrast, the applicant had answered question 12b in the affirmative. Thus, her application was not invalid on its face. In this situation, we believe that the regulations contemplate that should a deficiency be deemed to exist, BLM will make further inquiry prior to rejecting the application under 43 CFR 2421.2(d). Indeed, this was the precise procedure followed by the Nevada State Office in Elmer A. Kubler, 80 IBLA 283 (1984). In that case, as here, the applicant had responded to question 12b affirmatively. Subsequently, BLM sent an interlocutory notice of deficiency informing appellant that, if his affirmative response to question 12b was correct, he was required to submit evidence of the permit application within 30 days. Appellant in Kubler was also advised that if the answer to question 12b was not accurate, he should correct his application. Appellant thereupon changed his answer to question 12b from "yes" to "no." BLM then rejected his application. Id. at 284 n.3. We believe that this represents the proper approach under 43 CFR 2521.2(d). Thus, appellant should have been informed of the deficiency in her application and given an opportunity to correct the same.

Moreover, it is clear that appellant would have been able to correct the deficiency since she had, in fact, filed a permit application with the Nevada State Water Engineer prior to the time she originally filed her desert land entry application. We recognize, of course, that appellant's permit application was denied by the State Water Engineer on September 16, 1979. But, as we shall explain, this action is not dispositive of her appeal.

Appellant's application for a water permit was filed on March 30, 1979. By letter of July 18, 1979, a copy of the original application was returned to her with instructions to complete certain parts and submit a map prepared by a licensed State Water Right Surveyor. She was further informed that unless the amended application and map were filed within 60 days, "it becomes mandatory for the State Engineer to cancel the application."

By letter of August 12, 1979, appellant sought an extension of time on the grounds that she had not yet learned from BLM whether her desert land entry application had been granted or rejected and therefore was unable to complete the application as directed. By response dated August 27, 1979, her request for an extension was denied. This letter noted that the State Engineer could only grant a single extension of 60 days for the purpose of submitting the necessary amended application and map and that inquiry to the BLM State Office had indicated it would take at least a year before the application could be approved. The Office Engineer noted:

It is the State Engineer's decision therefore that an extension of time under Application 37427 cannot be granted.

The State Engineer is very strictly bound by the provisions of Nevada statute with regards to the processing of applications to appropriate water. At such time as an application is filed, the time parameters are specifically spelled out, and this office must work within those guidelines. It is unfortunate that the state laws for the appropriation of water and the Federal program for release of the land do not mesh in their timing. However they do not, and the state has no control over the administration of the DLE program or its funding. That remains the province of the Federal Government. Meanwhile, we must work within the provisions of the state water law.

What becomes apparent is that because of the relatively short time limit within which an water appropriation permit application must be perfected in Nevada it is extremely unlikely that anyone could file a permit application which would still be pending by the time that BLM could approve the desert land application. This is not meant as a criticism of BLM but as recognition of the fact that the numerous studies which BLM must complete prior to classification of land as suitable for desert land entry virtually ensure that the state time limit will expire prior to the time that BLM will be able to act on a petition-application. 2/

The fact remains, however, that appellant had initiated, as far as then possible, appropriate steps for the acquisition of a water right when she filed her desert land entry petition-application. This being the case, we feel BLM was obligated, prior to rejecting her application, to afford appellant an opportunity to show that she is "qualified under State law to secure such permit or right." See 43 CFR 2521.2(d).

2/ Of course, if the land has already been favorably classified, BLM might be able to act on the application in sufficient time so as not to make the State permit application an exercise in futility. In the instant case, however, certain lands sought by appellant were not classified as suitable for a desert land entry until Oct. 9, 1981.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case files are remanded for further action in accordance with the views expressed herein.

James L. Burski
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Franklin D. Arness
Administrative Judge

October 20, 1987

IBLA 84-413; 89 IBLA 311 (1985) : N-23404
:
JEAN P. WALSH (On Reconsideration) : Desert Land Entry
:
: Petition for Reconsideration
:
: Petition Granted

ORDER

By decision dated November 12, 1985, styled Jean P. Walsh, 89 IBLA 311, this Board vacated a decision of the Nevada State Office, Bureau of Land Management (BLM), rejecting desert land entry application N-23404. That application had been rejected on the ground that appellant had failed to provide evidence that she had made an application to the Nevada State Water Engineer for appropriation of Underground water for irrigation purposes.

In vacating the decision of the State Office, the Board noted that appellant had indicated on her desert land entry application, in response to question 12b, that she had "proceeded as far as possible toward acquiring * * * sufficient water to irrigate and reclaim permanently all of the irrigable portions of each of the legal subdivisions applied for." Id. at 313. We held, therefore, that, since the application was not defective on its face, the State Office should have informed appellant of the deficiency and offered her an opportunity to correct it.

The Board then discussed certain practical problems in the adjudication of the desert land entries which it believed were highlighted by the present appeal. Thus, the Board noted that, while Walsh's application for a water permit had been filed on March 30, 1979, a copy of the original application was returned to her in early July, with instructions to complete certain parts and submit a map prepared by a licensed State Water Right Surveyor within 60 days. Appellant thereupon sought an extension from the State Engineer on the ground that BLM had not yet acted on her desert land entry application and she was, therefore, unable to comply with the July request.

By letter dated August 27, 1979, the State Engineer rejected the request for an extension of time. The State Engineer explained that only a single 60-day extension was permissible for filing an amended application and supporting map. Noting that inquiry had been made to BLM's Reno office, the

Engineer informed appellant that, because of a lack of funding, BLM would not be able to allow any entries with the next fiscal year. The State Engineer concluded that "Based upon the information provided to this office by the BLM regarding the DLE program, the granting of an extension would seem somewhat futile and would no doubt only serve to delay for a short period the inevitable statutory requirement that the application be cancelled if the necessary amended application and supporting map are not timely filed with this office." The letter to appellant from the State Engineer concluded with the following paragraph:

The State Engineer is very strictly bound by the provisions of Nevada Statute with regards to the processing of applications to appropriate water. At such time as an application is filed, the time parameters are specifically spelled out, and this office must work within those guidelines. It is unfortunate that the state laws for the appropriation of water and the Federal program for release of the land do not mesh in their timing. However they do not, and the state has no control over the administration of the DLE program or its funding. That remains the province of the Federal government. Meanwhile, we must work within the provisions of the state water law.

Based on the foregoing, the Board made the following observation:

What becomes apparent is that because of the relatively short time limit within which a water appropriation permit application must be perfected in Nevada it is extremely unlikely that anyone could file a permit application which would still be pending by the time that BLM could approve the desert land application. This is not meant as a criticism of BLM but as recognition of the fact that the numerous studies which BLM must complete prior to classification of the land as suitable for desert land entry virtually ensure that the state time limit will expire prior to the time that BLM will be able to act on a petition-application.

Id. at 314 (footnote omitted).

On January 8, 1986, the Office of the Regional Solicitor filed a petition for reconsideration of the instant decision. In this petition, the State Office does not take issue with the conclusion of the Board that, under the facts of this case, appellant should have been given an opportunity to submit the required evidence prior to the rejection of her application. Rather, the petition is based on a fear, generated by the Board's observation quoted above, that the Board had misinterpreted various documents relating to the procedures actually followed by the State Engineer in the adjudication of water permits. Thus, the petition argues that, contrary to the implicit assumption of the Board, the State Engineer did not reject appellant's water permit application because she could not submit proof that the desert land entry had been approved. Rather, the petition argues, the State Engineer rejected the water permit application because of internal deficiencies therein, unrelated to the question of approval of the desert land entry

application.

Together with this petition, counsel submitted a letter from a Hydraulic Engineer employed by the Division of Water Resources explaining operating procedures. This letter provides, in part:

The State Engineer will withhold action on an application to appropriate water in support of a Desert Land Entry or Carey Act until the Bureau of Land Management can show that the water can be placed to beneficial use by allowing entry onto the parcel in question. If BLM does not find the land suitable for entry then the application will be subject to denial by the State Engineer.

In view of the above, it is clear that the practice of the State Engineer is not, as implied in our decision, to reject an application to appropriate water if BLM has not allowed the entry within the time period provided by the State regulations for perfecting an application; rather, if a completed application is filed, the State Engineer will suspend consideration until such time as BLM either allows or disallows the entry. We think it also clear, however, that these facts were not communicated to appellant in the letter she received from the State Engineer's Office in 1979.

The State Office points out:

though perhaps technically true at the time she originally filed her DLE application, it was not true that appellant had initiated as far as possible steps to acquire a water right under State law at the time her DLE application was adjudicated by the Bureau. Nor under a fair reading of Section 1 of the Desert Land Act and the purpose underlying the statute or 43 CFR 2521.1(d), would it have been proper for BLM to have approved appellant's DLE application on the basis of a previously cancelled water permit application.

Petition a 6. However, this confuses two discrete points. The first question is whether appellant's application was subject to summary rejection as defective on its face. As noted above, the Board held that it was not. The State Office now agrees with this ruling.

The second question, however, relates to the point in time when BLM has reached a substantive adjudication. We think it self-evident that BLM could not approve a desert land entry application unless it was then shown that the applicant had either acquired or had done everything possible at that point in time to acquire a water right. Nothing in our prior decision was intended to intimate anything to the contrary.

We do note, however, the BLM has agreed that, if its petition were granted, "BLM will provide applicant with a reasonable period of time to file a new application for a water permit with the Nevada State Engineer and to correct any deficiencies in that application or her DLE application that may be discovered by the State Engineer or BLM. If the State Engineer determines

that appellant has filed a proper water permit application, the Bureau will proceed without delay to adjudicate her DLE application." Since this was, indeed, the precise intent of our original decision, we think this course of action is entirely appropriate.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the petition for reconsideration is hereby granted and the decision rendered on November 12, 1985, is affirmed as modified and the case files are remanded for further proceedings not inconsistent with the views expressed herein.

James L. Burski
Administrative Judge

We concur:

R.W. Mullen
Administrative Judge

Franklin D. Arness
Administrative Judge

APPEARANCES:

Lynn Cox, Esq.
Office of the Regional Solicitor
2800 Cottage Way, Rm. E-2753
Sacramento, CA 95825

Jean P. Walsh
331 Nebraska
Henderson, Nevada 89015

